



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

March 29, 1989

Mr. Marvin J. Titzman
Executive Director
Texas Surplus Property Agency
Administrative Office
P. O. Box 8120
San Antonio, Texas 78208-0120

LO-89-33

Dear Mr. Titzman:

You ask about the source for the state contribution to the Employee Retirement System for a particular member of the board of the Texas Surplus Property Agency. Specifically, you ask whether the appropriation to the Surplus Property Agency is the source from which the contribution is to be made, and, if so, whether the Surplus Property Agency has authority to make the contribution from its appropriation.

Your question is a follow-up question to the issues raised in Attorney General Opinion JM-639 (1987). That opinion concluded that a certain individual who was an unpaid member of the board of the Surplus Property Agency could contribute to the Employee Retirement System (ERS). The opinion was based on the particular circumstances of that board member as well as the peculiar history of the Surplus Property Agency. Consequently, the decision affected only one individual.

In a brief written in response to your request for an opinion, the ERS has explained that although the individual has subsequently made contributions to the retirement system, the contributions have been placed in a suspense account. His service has not been accrued as credited service in the ERS because no contributions by the state have been made on his behalf. Section 23.201 of Title 110B provides:

Service is credited in the applicable membership class for each month in which a member holds a position and for which the required contributions are made by the member and the state.

There is no disagreement as to the requirement that a state contribution is necessary. The Surplus Property Agency takes the position, however, that the contribution should be made from funds appropriated to the ERS. The ERS takes the position that the contribution should be made from funds appropriated to the Surplus Property Agency. We conclude that the contribution should be made from funds appropriated to the Surplus Property Agency.

Section 25.403(e) of Title 110B provides:

All money allocated and appropriated by the state to the retirement system for benefits provided by the retirement system, except money for the payment of lump-sum death benefits and for the payment of benefits from the law enforcement and custodial officer supplemental retirement fund, shall be paid, based on the annual estimate of the retirement system, in monthly installments to the state accumulation fund. The money required for state contributions and membership fees shall be from respective funds appropriated to pay the compensation of the member for whose benefit the contribution or fee is paid. If the total of the estimated required payments is not equal to the total of the actual payments required for a fiscal year, the retirement system shall certify to the state comptroller of public accounts and the state treasurer at the end of that year the amount required for necessary adjustments, and the state treasurer shall make the required adjustments. (Emphasis added.)

See also Title 110B, § 23.302(d) (payment of state contribution for purchase of credit for military services). In order to implement that provision, the legislature has made an appropriation to the ERS that is to be used to make the state contribution for various members. Acts 1987, 70th Leg., 2d C.S., ch. 78, art. I, at 352 (I-93). That appropriation is based on an estimate of the amount necessary to make the required state contributions. See V.T.C.S. Title 110B, § 25.402(b) (regarding ERS estimate of funds necessary for state contribution). The appropriation comes from a number of different funds. Id. The ERS has explained that the amount from each fund is intended to cover the state contributions to the ERS for all ERS members whose state contributions come from that fund. See V.T.C.S. Title 110B, § 25.403(b). The ERS then draws on that appropriation to make payments into the state accumulation

fund. See V.T.C.S. Title 110B, § 25.308 (regarding state accumulation fund).

A problem arises in regard to the state contribution for unpaid administrative board members. As we discussed at length in Attorney General Opinion JM-639, certain unpaid administrative board members are eligible to be members of the ERS. Although Title 110B does set out the basis for computation of the contributions to ERS for unpaid administrative board service, V.T.C.S. Title 110B, § 23.502, it does not set out the source from which the state contributions are to be made for an unpaid administrative board member. ERS has made the administrative determination that the legislature would have intended that the contribution for an unpaid administrative board member come from the fund from which compensation is paid to the employees of the agency served by the unpaid administrative board member. We think that is an appropriate administrative determination in light of the general scheme governing the ERS. See Associated Indemnity Corp. v. Oil Well Drilling Co., 258 S.W.2d 523, 529 (Tex. Civ. App. - Dallas 1953), aff'd 264 S.W.2d 697 (Tex. 1954) (courts inclined to accept administrative agency's interpretation of statute if accepted over long period of time).

The appropriation to the Surplus Property Agency is made from the Property Fees fund. Acts 1987, 70th Leg., 2d C.S., ch. 78, art. I, at 502 (I-243). Since it is a lump-sum appropriation for all expenses of the Surplus Property Agency, compensation for Surplus Property Agency employees would come from that fund. No money was appropriated to the ERS for state contributions to the ERS from that fund for the current biennium.¹ We assume that at the time the ERS prepared its estimate of the funds necessary to make the state contributions, it did not consider the unusual circumstances of the board member in question here.² If those circumstances had been considered,

1. As we explained in Attorney General Opinion JM-639, Surplus Property Agency employees are members of the Teachers Retirement System rather than the ERS.

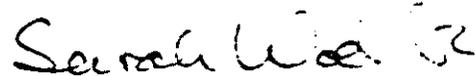
2. The ERS estimate is due on November 2 of each even-numbered year. V.T.C.S. Title 110b, § 25.403(b). Consequently, the estimate used in the budget for the current biennium would have been due by November 2, 1986. Attorney General Opinion JM-639, which held that the Surplus Property Agency board member in question was entitled to

Mr. Marvin J. Titzman
March 29, 1989
Page 4

presumably an appropriation to the ERS for the state contribution for that board member would have been made from the Property Fees fund. Therefore, we think that the appropriate source for the state contribution for the administrative board member in question is from the appropriation to the Surplus Property Agency.

You also suggest that the Surplus Property Agency has no authority to make the contribution to ERS. The appropriation to the Surplus Property Agency is a lump-sum appropriation and can therefore be used for any lawful expenditure of the agency. See generally Attorney General Opinion M-909 (1971). Because state law authorizes unpaid administrative board members to be members of the ERS in certain circumstances and because the legislature has acquiesced in the ERS practice of drawing the state contributions for such a member from the funds used to compensate the employees of the agency the board member serves, a contribution by the Surplus Property Agency from the fund from which its employees are paid is certainly an appropriate expenditure under state law. See V.T.C.S. art. 6252-6b, § 4(1)(agency may use fees collected as needed for operation of agency). The Surplus Property Agency is also subject to federal law. V.T.C.S. art 6252-6b, § 4; 40 U.S.C. § 484(j)(Federal Property and Administrative Services Act). However, we find nothing, and you suggest nothing, in the federal law that would prohibit the expenditure in question. See generally 40 U.S.C. § 484(j)(state agency distributing surplus property may use charges to cover direct and reasonable indirect costs of its activities).

Yours very truly,



Sarah Woelk, Chief
Letter Opinion Section
Opinion Committee

SW/lcd

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(Footnote Continued)

contribute to the ERS, was issued on February 26, 1987. Consequently, the ERS, which disagreed with the conclusion of JM-639, could not have known that a state contribution would be necessary for the Surplus Property Agency member in question and therefore would not have included such a contribution in its estimate.